

STATE OF MICHIGAN
COURT OF APPEALS

TOHNNI JONES, f/k/a TOHNNI REED-
GIANNOTTI,

UNPUBLISHED
July 17, 2007

Plaintiff-Appellant,

v

LOUIS P. GIANNOTTI,

No. 266568
Livingston Circuit Court
LC No. 94-21959-DM

Defendant-Appellee.

Before: Hoekstra, C.J., and Markey and Wilder, JJ.

WILDER, J. (*concurring in the judgment in part and dissenting in part*)

The majority holds that the trial court had subject matter jurisdiction of the issue of custody of Brandon, but erred in the exercise of that jurisdiction. I would hold that the trial court lacked subject matter jurisdiction of the issue of Brandon's custody. I would also hold that, because this Court is reversing the trial court's order granting Giannotti custody of Brandon, the case should be remanded to the trial court for a re-determination of whether the custody of Nicholas should be granted to Jones or to Giannotti.

I

The following facts supplement the majority's statement of facts. The Wayne circuit court's order of filiation ordered Lennon to pay child support for Brandon, provided that Jones would retain custody of Brandon until further order of the court, and ordered that the domicile or residence of Brandon would not be removed from Michigan or Washington without prior approval of the court.

Jones's complaint in the trial court alleged that both Brandon and Nicholas were born of the parties' marriage. However, the complaint also alleged that Brandon was born on June 26, 1993, almost 13 months *before* the marriage.

On May 9, 2005, Jones filed a motion for modification of judgment of divorce and/or for relief from judgment as to Brandon, asserting that the trial court lacked subject matter jurisdiction of the issue of custody of Brandon, in light of the order of filiation by Wayne circuit court. On May 12, 2005, Giannotti filed a motion to set aside the July 23, 2004 order amending the judgment of divorce, and for change of custody, parenting time and domicile.

Following a hearing, the trial court awarded sole legal custody of Brandon and Nicholas to Giannotti, and continued joint physical custody between Jones and Giannotti. On September 15, 2005, the trial court entered an order for change of legal custody, domicile, parenting time, child support and other relief. This order provided that Giannotti was the equitable father of Brandon, and would have legal custody of Brandon and Nicholas. The order further provided that the parties would have joint physical custody, designated Michigan as the state in which the children were domiciled, and made other provisions not relevant here.

II

A

“Jurisdiction of the subject matter is the right of the court to exercise judicial power over a class of cases, not the particular case before it; to exercise the abstract power to try a case of the kind or character of the one pending. The question of jurisdiction does not depend on the truth or falsity of the charges but upon it’s nature; it is determinable on the commencement, not at the conclusion, of the inquiry. Jurisdiction always depends on the allegations and never upon the facts.” [*Ryan v Ryan*, 260 Mich App 315, 331; 677 NW2d 899 (2004), citing *Altman v Nelson*, 197 Mich App 467, 472; 495 NW2d 826 (1992) (citations omitted).]

The subject-matter jurisdiction of a court arises by law, not by the consent of the parties. *Bowie v Arder*, 441 Mich 23, 56; 490 NW2d 568 (1992). “The circuit court’s jurisdiction over divorce cases is strictly statutory.” *Ryan*, *supra* at 331. The circuit court’s jurisdiction to enter custody orders in a divorce case is conferred by MCL 552.16(1); “[u]pon annulling a marriage or entering a judgment of divorce or separate maintenance, the court may enter the orders it considers just and proper concerning the care, custody, and . . . support of a minor child of the parties.” “Parties cannot give a court jurisdiction by stipulation where it otherwise would have no [subject-matter] jurisdiction.” *Bowie*, *supra* at 56 (citation omitted).

“When a court lacks subject matter jurisdiction to hear and determine a claim, any action it takes, other than to dismiss the action, is void.” *Bowie*, *supra* at 56 (citation omitted). “Further, a court must take notice of the limits of its authority, and should on its own motion recognize its lack of jurisdiction and dismiss the action at any stage in the proceedings.” *Id.* (citation omitted). A challenge to a court’s subject-matter jurisdiction may be raised at any time, including for the first time on appeal. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 97-98; 693 NW2d 170 (2005).

The majority concludes that the trial court had subject-matter jurisdiction of the issue of custody of Brandon, but that the trial court erred in the exercise of that jurisdiction. The majority relies on the fact that Jones alleged in her complaint in the trial court that Brandon was a child of the parties. But Jones also alleged in the complaint that Brandon was born on June 26, 1993, almost 13 months *before* the marriage. Therefore, the complaint could not have established that the trial court had subject-matter jurisdiction of the issue of Brandon’s custody under MCL 552.16.

The majority relies on *Luscombe v Shedd's Food Products Corp*, 212 Mich App 537, 542; 539 NW2d 210 (1995), for its conclusion that the trial court had subject matter jurisdiction, but erred in the exercise thereof. In *Luscombe*, the issue was whether plaintiff was entitled to have a jury verdict set aside for the reason that the trial commenced before the record was returned by the Court of Appeals to the circuit court following a prior appeal. *Id.* at 538. This Court held: "There is no dispute that the circuit court had subject-matter jurisdiction over this case, which is basically a wrongful discharge action Its actions before the filing of this Court's remittitur or mandate thus were not void, but merely voidable as the erroneous exercise of jurisdiction. Plaintiff did not object to this erroneous exercise of jurisdiction" *Id.* at 542. In the case at bar, subject-matter jurisdiction *is* disputed. Therefore *Luscombe* is inapposite.

Jones argues that the Livingston circuit court lacked subject matter jurisdiction over the issue of custody of Brandon, and that instead, because of its order of filiation, the Wayne circuit court had such jurisdiction. I agree with Jones' contention.

"Well established principles guide this Court's statutory construction efforts. We begin our analysis by consulting the specific statutory language at issue." *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 458; ___ NW2d ___ (2006), quoting *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1, 10; 654 NW2d 610 (2002). "This Court gives effect to the Legislature's intent as expressed in the statute's terms, giving the words of the statute their plain and ordinary meaning." *McManamon v Redford Charter Twp*, 273 Mich App 131, 135; ___ NW2d ___ (2006), citing *Willett v Waterford Charter Twp*, 270 Mich App 38, 48; 718 NW2d 386 (2006). "When the language poses no ambiguity, this Court need not look outside the statute, nor construe the statute, but need only enforce the statute as written." *McManamon, supra* at 136. "This Court does not interpret a statute in a way that renders any statutory language surplusage" *Id.*, citing *Pohutski v City of Allen Park*, 465 Mich 675, 684; 641 NW2d 219 (2002).

By the plain language of MCL 552.16, the trial court only had jurisdiction to issue orders concerning the custody of a child "*of the parties.*" (Emphasis added). As established by the order of filiation of the Wayne circuit court, Lennon is the legal father of Brandon. Moreover, Giannotti does not contest the fact that Brandon is the biological child of Lennon and Jones, and it is undisputed that Brandon was born 13 months before plaintiff and defendant were married. Accordingly, as a matter of law, Brandon is not a child of the parties within the meaning of MCL 552.16, and the Livingston circuit court therefore lacked subject-matter jurisdiction to determine custody of Brandon in the parties' divorce. *Ryan, supra* at 331.

In addition, MCL 722.720 provides that in paternity actions, the "court has continuing jurisdiction over proceedings brought under this act to increase or decrease the amount fixed by the order of filiation . . . and to provide for, change, and enforce provisions of the order relating to the custody or support of . . . the child." The Wayne circuit court order of filiation determined that Lennon was Brandon's biological father, and granted custody of Brandon to Jones. Thus, under MCL 722.720, the Wayne circuit court had continuing subject-matter jurisdiction of the issue of custody of Brandon.

Our court rules also expressly emphasize the point that subject-matter jurisdiction of Brandon's custody rested with the Wayne circuit court and not with the Livingston circuit court. MCR 3.204(B) provides: "If an action is pending in circuit court for the support or custody of a

minor . . . or the circuit court has continuing jurisdiction over such matters because of a prior action, a subsequent action for support, custody, or visitation with regard to that minor *must* be initiated as an ancillary proceeding.” (Emphasis added). “Must” is mandatory. *Old Kent Bank v Kal Kustom Enterprises*, 255 Mich App 524, 532-533; 660 NW2d 384 (2003). An ancillary proceeding is “[a]n action, either at law or in equity, *that grows out of and is auxiliary to* another suit and is filed to aid the primary suit, to enforce a prior judgment, or to impeach a prior decree.” *Black’s Law Dictionary*, (8th Ed.), p 1475 (emphasis added). Because the divorce action was not “initiated as an ancillary proceeding” to the Wayne circuit court action, the Livingston circuit court lacked authority to address the issue of custody of Brandon.

In addition, MCR 3.205(C)(2) provides: “A subsequent court *must* give due consideration to prior continuing orders of other courts, *and may not enter orders contrary to or inconsistent with such orders*, except as provided by law.” (Emphasis added.) Again, “must” is mandatory. *Old Kent Bank*, *supra* at 532-533. Here, the trial court, once aware of the Wayne circuit court order, was required to “give due consideration” to the Wayne circuit court order, and was prohibited from entering orders contrary to or inconsistent with the Wayne circuit court order.

Under MCL 552.16, MCL 722.720, and MCR 3.205(B) and (C)(2), it is clear that the Livingston circuit court had no subject-matter jurisdiction of the issue of Brandon’s custody, which continued in the Wayne circuit court. However, because the majority reverses the trial court’s custody order as to Brandon, I concur in the judgment as regards Brandon’s custody.

B

In light of the majority’s finding that the trial court had subject-matter jurisdiction of the issue of Brandon’s custody, but erred in the exercise of that jurisdiction, I would also vacate the custody ruling as to Nicholas and remand so that the trial court may consider anew the best interest of Nicholas.

III

In my view, the trial court lacked subject-matter jurisdiction of the issue of Brandon’s custody, because the Wayne circuit court order established that Brandon is not a child of the parties. I agree with the majority that the trial court erred as a matter of law in ordering Jones to dismiss the Wayne circuit court paternity action. In light of this Court’s reversal of the order regarding Brandon’s custody, I would also reverse regarding custody of Nicholas, to allow the trial court to revisit that issue. For the reasons stated above, I concur in the majority’s decision to reverse the trial court’s order regarding Brandon’s custody, and dissent from the majority’s affirmance regarding Nicholas’s custody.

/s/ Kurtis T. Wilder